

1
2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Eric George McNeill,

10 Petitioner,

11 v.

12 Ryan Thornell, et al.,

13 Respondents.
14

No. CV-24-08152-PCT-GMS

**ORDER
and
DENIAL OF CERTIFICATE OF
APPEALABILITY AND IN FORMA
PAUPERIS STATUS**

15 Pending before the Court is the Report and Recommendation (“R&R”) of
16 Magistrate Judge James F. Metcalf (Doc. 30) regarding petitioner’s Petition for Writ of
17 Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R recommends that
18 the Petition be dismissed with prejudice. The Magistrate Judge advised the parties that
19 they had fourteen days to file objections to the R&R. (R&R at 18 (citing *United States v.*
20 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Petitioner filed objections on January
21 28, 2025 (Doc. 35) and Respondents filed a reply on February 3, 2025 (Doc. 36). Petitioner
22 then filed a Surreply on February 10, 2025 (Doc. 37) and Defendants have filed a Motion
23 to Strike Surreply (Doc. 38).

24 The Court has considered the objections and reply and reviewed the Report and
25 Recommendation de novo. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1) (stating that
26 the court must make a de novo determination of those portions of the Report and
27 Recommendation to which specific objections are made. The Court will not consider
28 Plaintiff’s Surreply (Doc. 37). Surreply briefs are not allowed by the rules. Defendants’

1 Motion to Strike Surreply is granted (Doc. 38).

2 In his objections, Mr. McNeill states that the R & R is “non-factual” in its recitation
3 of the charges contained in his indictments and petition to revoke probation, of his
4 acceptance of a plea bargain; the descriptions of the underlying state court proceedings and
5 pleadings in this habeas proceeding and of his investigation into the factual basis of his
6 habeas claims. (Doc. 35, at 1-7).

7 Mr. McNeil further states that the R & R “confused” the Arizona statutory
8 limitations period with AEDPA’s limitation period and that, because his claims relate only
9 to Arizona criminal law, they are not subject to AEDPA (Doc. 35, at 9-11); that his petition
10 is timely (Doc. 35, at 16); that he has demonstrated actual innocence based largely on the
11 grounds contained in his habeas petition (Doc. 35, at 16-18; Doc. 12, at 13-78).

12 Mr. McNeil’s Objections fails to cite to anything in the record to refute the R & R’s
13 factual findings or cite to authority that supports his objections to the R & R.

14 The Court does accept Petitioner’s Objection that the R & R inaccurately calculates
15 the time between the dismissal of his petition to revoke probation and his subsequent
16 indictment as 13 years when it was actually 23 years (Doc. 35, 2). (Doc. 30 (R&R), p. 1,
17 line 26)

18 The Court further finds that the R & R incorrectly recounts his sentence as a 9-year
19 term in prison followed by a 23-year term because the record shows that he was sentenced
20 to a 4-year term followed by a 23-year term (See Doc. 1-1, at 16; Doc. 18, at 2.) (Doc. 30,
21 (R&R), p. 2, line 4).

22 The Court thus accepts the recommended decision within the meaning of Rule
23 72(b), Fed. R. Civ. P., and overrules Petitioner’s objections except as set forth above. See
24 28 U.S.C. § 636(b)(1) (stating that the district court “may accept, reject, or modify, in
25 whole or in part, the findings or recommendations made by the magistrate”).

26 **IT IS ORDERED** directing the magistrate judge to amend the R&R (Doc. 30) to
27 reflect the following corrections:

- 28 1. Change 13 to 23, p. 1, line 26.

1 2. Change 9 to 4, p. 2, line 4.

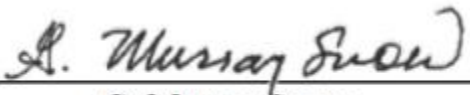
2 **IT IS FURTHER ORDERED** granting Defendants' Motion to Strike Surreply
3 (Doc. 38).

4 **IT IS FURTHER ORDERED** that the Report and Recommendation of the
5 Magistrate Judge (Doc. 30) and as amended as set forth above is accepted.

6 **IT IS FURTHER ORDERED** that the Clerk of the Court enter judgment denying
7 and dismissing Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C.
8 § 2254 (Doc. 1) with prejudice. The Clerk shall terminate this action.

9 Rule 11 of the Rules Governing Section 2254 Cases in the United States District
10 Courts requires the district court to "issue or a deny a certificate of appealability when it
11 enters a final order adverse to the applicant." Rule 11, 28 U.S.C. foll. § 2254. A certificate
12 of appealability is denied because dismissal of the Petition is justified by a plain procedural
13 bar and jurists of reason would not find the procedural ruling debatable.

14 Dated this 11th day of February, 2025.

15 
16 _____
17 G. Murray Snow
18 Senior United States District Judge
19
20
21
22
23
24
25
26
27
28